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Beyond Dispute: An Air Quality Agreement in the Context of a Consultative Relationship

Richard J. Smith and Susan Biniaz***

I. INTRODUCTION

I once heard then Deputy Prime Minister Allan MacEachen describe the United States and Canada as two countries that share the world's longest undefended cliché. Indeed, much of what one can say about the relationship between the two countries can be described as having a faintly trite ring to it. The fact remains, however, that in making some well-worn points we are describing a unique and incredible relationship that presents the world with an invaluable example of how two countries can successfully manage a vast and complex set of shared concerns and issues.

There is quite simply something different-and I would argue better-about the way the United States manages its relations with Canada than with other countries. More than with any other country, the United States views the benefits of the relationship broadly and not so much on a transaction-by-transaction basis. Long ago the United States made the calculation that a good, cordial working relationship with Canada was very important to it, and all its dealings with Canada are conducted taking that consideration into account.

Tactically, the United States has enshrined the principle that in U.S.-Canadian relations it will avoid, to the extent possible, linking unrelated issues. Rather, the approach is to resolve issues one at a time on their own merits and, importantly, when an issue cannot be resolved, the two countries seek to find a way to manage it so as to minimize contentiousness.

The theory is that in a relationship as dense and complex as the U.S.-Canadian one, any attempt to set up linkages or trade-offs between issues inevitably escalates the potential for causing significant damage to the overall relationship.

Having made my point, I do not want to overstate it. Trouble on any issue affects the atmosphere in which the two nations address other

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The views expressed in this paper are those of the authors and do not necessarily reflect the views of the U.S. Government.

issues and may indeed make it more difficult to resolve them. Nonetheless, the nations' ability to avoid getting into a pattern of tit for tat trade-offs has been a key factor in the overall well-being of U.S.-Canadian relations.

II. A TOOLCHEST OF TECHNIQUES

In the context of this special relationship, both countries have been creative and enlightened in developing mechanisms for dealing with disputes. What has evolved is what one perceptive writer on the subject, Professor Richard Bilder, has called a "toolchest of techniques." This process should be viewed broadly since it deals as much with the prevention and management of disputes as with their resolution. The International Joint Commission, created by the 1909 Boundary Waters Treaty, is perhaps the prime example of such a mechanism. In response to joint references, it has provided sound and helpful advice to the two governments on a range of transboundary issues, primarily related to water quality and levels, as well as assisting in the implementation of the Great Lakes Water Quality Agreement.

A "consultative relationship," in which procedures are put in place to engage any issue that may arise to keep us talking about and working on problems until they are resolved, has developed between the two governments. It is an approach that may often appear ponderous and frustrating, but it works. Problems are generally resolved in ways that meet the interests of both countries.

The acid rain issue and the recently concluded U.S.-Canada Air Quality Agreement provide good examples of how the United States and Canada currently deal with difficult and serious bilateral problems. I have been involved in the management of the acid rain issue in one capacity or another for more than thirteen years and will review, by way of illustration, the relationship as a case study. But first, in order to better set the context, I would like to cite a few other examples from my own experience that I believe are particularly instructive from various perspectives in understanding the special U.S.-Canadian approach to dispute resolution—or more correctly—dispute prevention and management. These include the use of the bilateral Consultative Mechanism on Energy, the handling of the "Northwest Passage" dispute, and the agreement dealing with the transboundary Porcupine Caribou Herd.

III. THE ENERGY RELATIONSHIP

In the first few years of the 1980s, when I was *Chargé*, and subsequently, Deputy Chief of Mission at our Embassy in Ottawa, the United States and Canada had quite a sharp confrontation over energy issues. Canada's New Energy Policy (NEP), announced in October of 1980, was aimed at reducing foreign ownership of the Canadian oil industry and provided discriminatory benefits for Canadian-owned oil companies.

Further, it had what was termed a "retroactive back-in feature" through which the Canadian Government asserted a twenty-five percent share in existing oil and gas finds on crown lands. From Canada's perspective, this was an appropriate assertion of a sovereign interest in a key natural resource. From the United States' perspective, however, it smacked of expropriation without adequate compensation.

The problem was eased when the Canadian government began back-pedaling from the NEP in the face of growing criticism from its own domestic business community and in recognition of the fact that it had chosen an historically bad moment to pursue a policy of moving from equity to debt financing in the oil industry - the prime rate was approaching 20 percent and oil prices were not rising as had been anticipated - with devastating effect on Canadian companies. However, the clear long-term message to those of us involved in managing the relationship was that we had to have a better and more systematic way of discussing and consulting on energy issues before they could get out of hand.

As a result, at the end of 1982, the Joint Energy Consultative Mechanism (an Assistant Secretary level forum which had fallen into disuse and had last met in 1978), was reactivated at a senior-working-level to improve the way the two countries dealt with energy issues. Since then, this committee, chaired on the U.S. side by the Deputy Assistant Secretary of State responsible for energy policy, has been meeting twice a year. In addition to facilitating a successful resolution of the NEP issues, it has made a major contribution in keeping energy relations between the governments on an even keel and in dealing with issues before they become major irritants.

IV. NORTHWEST PASSAGE SEARCH FOR A SOLUTION

United States handling of the "Northwest Passage" dispute, or "the Canadian Arctic waters" dispute as Canada would prefer to call it, is noteworthy as a classic example of how the United States has been able to manage issues even when the vital interests of both countries are seemingly irreconcilable. The contrast of the two countries' views of these waters is stark. Canada views them as internal Canadian waters subject to the full exercise of Canadian sovereignty. The United States, while recognizing Canada's special responsibility for their management and environmental protection, views these waters as constituting a passage connecting two parts of the high seas, through which we have a right of passage consistent with recognized international law relating to the freedom of the seas.

Thus, the stage was set for confrontation when, in August of 1985, the U.S. Coast Guard icebreaker *Polar Sea* was required for unanticipated operational reasons to make an East-to-West transit through the Northwest Passage. The United States government notified Canadian authorities and offered to cooperate fully with them regarding the pas-

sage. To this end, Canadian Coast Guard officers were even allowed on board the U.S. vessel for the transit. The United States, however, stopped short of seeking permission. Consistent with its international law position, it could not say "may I." This caused a political firestorm in Canada which led to that country pressing with renewed vigor and specificity its internal waters claim.

After more than two years of intense talks, the two nations were able to agree on a joint statement in January of 1988 that artfully met the needs of both countries in a way which did not prejudice the international law positions of either. The agreement provided that any U.S. ice breaker transits of the Northwest Passage would take advantage of the opportunity to conduct scientific research, for which permission would be routinely sought. This brought the activity within a legal framework that both sides agreed required coastal state consent. Thus, in the great tradition of U.S.-Canadian relations, the two nations were once again able to defuse an issue in a way that avoided damaging the overall relationship, even though the conflict at its core could not be resolved.

V. THE PORCUPINE CARIBOU AGREEMENT

Porcupine Caribou are neither small animals with horns nor large ones with quills. This caribou herd, named for the Porcupine River which flows through its habitat, at 180,000 head, is the world's largest transboundary herd and is an essential source of sustenance for native peoples in both the United States and Canada. Moreover, it has chosen as its primary calving ground a portion of the Alaskan National Wildlife Preserve (ANW), which is also the likely site of the largest remaining untapped oil reserve in the United States. Thus, the management and preservation of this herd has become a sensitive issue of significant interest to both countries.

I represented U.S. concerns in a week-long negotiating session with Canada in Seattle, Washington, in December 1986. This session capped an on-and-off effort over some eight years to conclude a Porcupine Caribou agreement. The agreement that resulted from that session was signed in Ottawa in July 1987, and established an eight-member International Porcupine Caribou Board to consider matters affecting the herd and to give advice and make recommendations to the Parties. The Board has four members from each country who are chosen to reflect the interests of management agencies, local communities, users of the herd, and scientific and other interests. An innovative feature was to build in a decision-making principle that assures that the Board's recommendations are supported by a majority of each party's appointees. This approach, which in effect requires agreement of three out of four of each side's members, assures that recommendations will have solid Board backing while avoiding a situation in which a single member on either side could block a consensus and create an impasse.

VI. AIR QUALITY AGREEMENT - THE ACID TEST

The most recent example of U.S.-Canada cooperation in the environmental area is the Air Quality Agreement, signed by President Bush and Prime Minister Mulroney on March 13, 1991, in Ottawa. That agreement embodies in one document a range of valuable dispute settlement techniques.

In the most literal sense, the Agreement itself could be viewed as a dispute settlement technique. By that I mean that the Agreement is, in part, intended by both governments to put an end to the acid rain debate that has raged between the two countries for well over a decade.

In 1978, a Bilateral Research Consultation Group was established to evaluate and report on the extent and significance of long-range air pollution. This group represented the first joint effort with Canada to deal with the acid rain issue.

The two governments, in a Memorandum of Intent on August 5, 1980, recognized the seriousness of acid rain and accepted a mutual commitment to work toward a bilateral agreement as soon as possible. An agreement, however, was not reached under that Memorandum. Because of differences between the two sides concerning the state of our knowledge of the nature and effects of acid rain, as well as differences in the domestic politics affecting this issue, negotiations ended in 1983. The United States launched a major decade-long study of the problem under the aegis of the National Acid Precipitation Program (NAPAP).

In a meeting between President Reagan and Prime Minister Mulroney in March 1985, the two leaders acknowledged publicly that acid rain was a serious matter affecting bilateral relations. Each appointed a Special Envoy to review jointly the acid rain issue and to make recommendations for consideration at their next meeting in the spring of 1986. The Envoys, former Premier of Ontario, Bill Davis, and former Secretary of Transportation, Drew Lewis, issued a joint report which was endorsed by the President and Prime Minister in March 1986.

The Davis/Lewis report led to a multi-billion dollar program in the United States for building pilot projects to prove the viability of promising clean coal technologies. The report also resulted in the establishing of a unique advisory body, which included a Canadian official as a member, to the U.S. Secretary of Energy on this program. Significantly, the report clearly stated that acid rain was a serious transboundary issue needing to be addressed by both countries - a conclusion endorsed by both governments.

In the late-1980s, attempts to negotiate an agreement broke down over the issue of targets and timetables for emissions reductions, with the United States unwilling to include them and Canada unwilling to negotiate an agreement without them.

Following his meeting with Prime Minister Mulroney in early 1988, President Bush announced that discussions on a bilateral accord could

begin with Canada after the President submitted to Congress a comprehensive Clean Air Act reauthorization proposal, including acid rain reduction targets and timetables. The President submitted such a proposal in July 1989 calling for, among other things, specific emissions reductions of the principal acid rain precursors - sulphur dioxide (SO₂) and nitrous oxide (N₂O) - on a specific timetable. In March 1990, the President named me to be Special Negotiator for Acid Rain Talks with Canada.

After the President's submission of his legislative proposal to Congress, the United States and Canada began informal discussions concerning the elements that an air quality agreement would contain. There were two underlying assumptions to these discussions: (1) that passage of the Clean Air Amendments would be a precondition on the U.S. side for conclusion of an agreement containing targets and timetables; and (2) that the inclusion of particular targets and timetables in the Clean Air Act Amendments would be a precondition on the Canadian side for conclusion of an agreement.

Although it had been anticipated that the legislative process would be far enough along by the end of 1989 so that formal negotiations could begin, it was only in the summer of 1990 that the process had progressed to a point permitting formal negotiations.

Bills voted out of both Houses of Congress contained almost identical provisions as to emissions reductions and timetables. As a result, at the July 1990 Houston G-7 Summit, President Bush and Prime Minister Mulroney called for formal negotiations on the air quality accord to begin. These negotiations began in Ottawa on August 28, 1990. President Bush signed the Clean Air Act Amendments into law on November 15, 1990. The U.S.-Canada Air Quality Agreement was signed on March 13, 1991.

In an attempt to put to rest the acid rain dispute, the Agreement specifically focuses on the principal acid rain precursors. To this end, it contains in an annex concrete objectives for SO₂ and N₂O emissions reductions or limitations which each country is to achieve. These objectives are framed as international legal commitments. For example, with respect to SO₂ emissions, the United States will reduce annual emissions by approximately ten million tons from 1980 levels by the year 2000, and will achieve a permanent national emission cap of 8.95 million tons for electric utilities by the year 2010. Canada, similarly, will reduce emissions in the seven eastern most provinces to 2.3 million tons per year by 1994, achieve a cap in those provinces at 2.3 million tons per year from 1995 through 2000, and achieve a permanent national emissions cap of 3.2 million tons per year by the year 2000.

While the two governments could have chosen to limit the Agreement's scope to the acid rain issue, to fix a pre-existing problem, they elected instead to take the opportunity to create a broad legal and institutional framework for addressing all transboundary air pollution issues of

mutual concern. The Agreement is, therefore, also forward-looking and is described in Article II as a “practical and effective instrument to address shared concerns regarding transboundary air pollution.” In this sense, the Agreement can be viewed as a dispute prevention and management device.

There are in fact several elements to the Agreement’s dispute prevention and management role. First, as a procedural matter, the Agreement calls for each party to notify the other party concerning proposed actions within its territory that, if carried out, would likely cause significant transboundary air pollution. It also calls for consultation, at the request of the other party, in cases of both proposed and on-going actions that would likely cause significant transboundary air pollution. Furthermore, from a substantive point of view, the Agreement commits the parties to take measures as appropriate to avoid or mitigate the potential risk posed by actions that would likely cause, or may be causing, significant transboundary air pollution. These provisions are intended to operate by spotting potential problems at an early stage, permitting the potentially affected party to make its views known, and assisting the parties in avoiding disputes.

Second, the Agreement contains extensive provisions on coordinating scientific and technical activities and economic research. Such cooperation is intended, in the Agreement’s words, to “improve their understanding of transboundary air pollution concerns and to increase their capability to control such pollution.” The Agreement also calls for regular exchanges of scientific and technical information. Differences over scientific issues played a significant role in the acid rain dispute. It is hoped that enhanced cooperation in scientific and technical activities and economic research will minimize such differences on other air pollution issues.

Third, the Agreement provides for consultations at the request of either party, on any matter within the scope of the Agreement. The Agreement’s scope is very broad, encompassing shared concerns regarding transboundary air pollution. Via this provision the parties hope to channel issues and potential problems through a routine diplomatic process. Such an approach will assist them in anticipating potential problems and managing problems, should they arise, in a controlled fashion.

The Agreement’s dispute prevention and management role is also to be found in its use of two methods often employed in the U.S.-Canada context: the use of bilateral intergovernmental bodies and the use of international institutions. In terms of bilateral bodies, the Agreement establishes an Air Quality Committee to assist in the Agreement’s implementation, including the preparation of progress reports. This Committee will enable the parties to maintain regular contact on issues of mutual concern.

The Agreement also contains an important role for the International

Joint Commission namely, to invite public comments, to hold public hearings as appropriate on the reports produced by the Air Quality Committee, and to submit a synthesis of such views to the parties. This feature of the Agreement is an important innovation in terms of international environmental agreements.

The information flow from both U.S. and Canadian governmental experts, as well as both U.S. and Canadian citizens, should assist the parties in their periodic assessment of the Agreement's implementation, including anticipating any potential problem areas.

Apart from dispute prevention and management, the Agreement contains dispute settlement provisions designed to address disputes arising under the Agreement itself. In this regard, the Agreement contains a distinctive approach to distinguishing between traditional "legal" disputes and "policy" disputes. For traditional "legal" disputes, that is, those involving disputes over the interpretation or implementation of the Agreement, the parties are to seek resolution through negotiations. If negotiations fail, upon the request of either party, the parties must submit the dispute to an agreed form of dispute resolution. Thus, third-party dispute resolution is mandatory, but the precise third party, the type of third-party involvement, and the nature of any decision are left for the parties to determine on a case-by-case basis. The Agreement provides that the parties are first to consider submitting the dispute to the International Joint Commission, but if either party chooses not to, the parties must agree upon another option.

In addition, however, it was deemed desirable to provide a mechanism for addressing "policy" disputes, by which is meant areas of disagreement not involving interpretation of the Agreement or a charge that the Agreement is being violated. The parties considered that, apart from the specific commitments respecting SO₂ and N₂O, the general objective of the parties to "control" transboundary air pollution might prove too loose a standard to allege a violation with respect to other pollutants.

Thus, the Agreement provides for issues other than traditional legal disputes to be referred, at the request of one party, to a third party in accordance with agreed terms of reference. Like the provision on traditional dispute settlement, resort to a third party is mandatory, but the precise third party and nature of third-party involvement are to be determined on a case-by-case basis. Further, in the case of policy disputes, there would appear to be even more options with respect to third-party involvement, such as fact-finding.

VII. CONCLUSION

The long-running acid rain dispute put a substantial strain on, but did not break, the mold of the cooperative U.S.-Canada relationship. It was an inherently difficult issue for a number of reasons. The pollutants involved were produced in much greater quantity in the United States

and prevailing winds contributed to making the United States more of a problem for Canada than vice versa. Further, because of its relative lack of buffering capacity, Canada's lakes were more vulnerable to the pollutants involved. Significantly, the necessary corrective steps were clearly more expensive and socially disruptive in the United States than in Canada. Canada could achieve substantial reductions of SO₂ from relatively few point sources, e.g., metallurgical plants, without the broad and substantial impact on the power generation industry required in the United States.

Notwithstanding the difficulties involved, patient work on the issue over an extended period paid off, and the two countries now have confidently and conclusively put this issue behind them. Importantly, the Air Quality Agreement not only resolves the acid rain problem, which Canadian officials had repeatedly referred to as the "litmus test" of the relationship, but also puts in place the institutional machinery needed to assure that future air quality issues are handled from the beginning in a more systematic and cooperative manner.

